2015

State of Utah, Plaintiff/Appellee, v. Kris David Ordiway, Defendant/Appellant

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff/Appellee	:	
v.	:	
KRIS DAVID ORDIWAY,	:	Case No. 20140134-CA
Defendant/Appellant.	:	Appellant is incarcerated.

BRIEF OF APPELLANT

Appeal from a conviction for one count of Criminal Solicitation of Rape of a Child, a first degree felony, in violation of Utah Code §76-4-204, with conviction being entered as a second degree felony pursuant to Utah Code §76-3-402; three counts of Sexual Abuse of a Child, second degree felonies, in violation of Utah Code §76-5-404.1(2); one count of Enticement of a Minor Over the Internet, a second degree felony, in violation of Utah Code §76-4-401; and one count of Tampering with a Witness, a third degree felony, in violation of Utah Code §76-8-508(1), in the Third Judicial District Court, in and for Salt Lake County, State of Utah, the Honorable Bruce C. Lubeck presiding.

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JURISDICTIONAL STATEMENT

Jurisdiction is conferred upon this Court pursuant to Utah Code §78A-4-103(2)(j) (2008). *See* Addendum A (Sentence, Judgment, Commitment); R.415-17.[1]

STATEMENT OF ISSUES, STANDARDS OF REVIEW, PRESERVATION

Issue I: Whether Ordiway's conviction for Enticement of a Minor should be reversed where the offense requires that a defendant act "knowingly," but the trial court instructed the jury that the offense could be committed "intentionally, knowingly, or *recklessly*."

Standard of Review and Preservation: This Court will review "trial errors in the jury instructions under the ineffective assistance of counsel doctrine." *State v. Malaga*,

[1] This appeal was originally filed in the Utah Supreme Court and transferred to this Court pursuant to rule 42(a) of the Utah Rules of Appellate Procedure. R.415-17. However, the trial court reduced Ordiway's conviction for Criminal Solicitation of Rape of a Child, a first degree felony, to a second degree felony under Utah Code §76-3-402. Alternatively, this Court has jurisdiction pursuant to Utah Code §78A-4-103(2)(e).

2006 UT App 103, ¶10, 132 P.3d 703. "'Where . . . a claim of ineffective assistance of counsel is raised for the first time on appeal without a prior evidentiary hearing, it presents a question of law.'" *Id.*

Issue II: Whether Ordiway's convictions for Sexual Abuse of a Child and Criminal Solicitation of Rape of a Child should be reversed where the sole witness to the alleged crimes gave uncorroborated testimony so conflicting and biased that it was inherently improbable.

Standard of Review and Preservation: This Court will reverse a jury conviction for insufficient evidence when "the evidence is sufficiently inconclusive or inherently improbable that reasonable minds must have entertained a reasonable doubt that the defendant committed the crime of which he was convicted." *State v. Shumway*, 2002 UT 124, ¶15, 63 P.3d 94. "To prevent unappealable injustice," the Utah Supreme Court has held "that the definition of inherently improbable must include circumstances where a witness's testimony is incredibly dubious and, as such, apparently false." *State v. Robbins*, 2009 UT 23, ¶18, 210 P.3d 288. This issue can be reached under the doctrines of plain error and ineffective assistance of counsel, which are exceptions to the preservation rule and are reviewed as a matter of law. *See, e.g.*, *State v. Kozlov*, 2012 UT App 114, ¶28, 276 P.3d 1207.

RELEVANT STATUTES, RULES, AND CONSTITUTIONAL PROVISIONS

The text of the following relevant provisions are provided in full in Addendum B: Utah Code §76-4-203, §76-4-204, §76-4-401, §76-5-402.1, and §76-5-404.1.[2]

STATEMENT OF CASE

On October 18, 2012, the State charged Kris Ordiway ("Ordiway") by Information with one count of Attempted Rape of a Child, two counts of Aggravated Sexual Abuse of a Child, one count of Attempted Aggravated Sexual Abuse of a Child, and one count of Enticement of a Minor. R.1-4. The State filed an Amended Information on October 24, 2012, R.7-10, and a Second Amended Information on January 2, 2013. R.22-26. The Second Amended Information charged Ordiway with one count of Attempted Rape of a Child or alternatively, Criminal Solicitation of Rape of a Child (Count 1), three counts of Aggravated Sexual Abuse of a Child (Counts 2-4), one count of Enticement of a Minor (Count 5), one count of Dealing in Harmful Material to a Minor (Count 6), and two counts of Tampering with a Witness (Counts 7-8). R.22-26. At a preliminary hearing held on January 2, 2013, Ordiway was bound over on all counts. R.27-29; 452:159.[3]

A three-day jury trial took place on September 4-6, 2013. R.453-55. At the close of the State's case, defense counsel made a "general motion for a directed verdict" on all

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[2] After the alleged crimes were committed in 2012, the legislature passed various amendments to Utah Code §76-4-203, §76-4-401, §76-5-402.1, and §76-5-404.1. The amendments, however, are not relevant to the issues raised in this appeal. Accordingly, Addendum B contains the current version of these statutes, which are cited to throughout this brief.

[3] With regard to Count 1, Attempted Rape of a Child or alternatively, Criminal Solicitation of Rape of a Child, the magistrate determined that Criminal Solicitation of Rape of a Child was the proper charge to proceed with. R.452:159.

counts. R.454:205. Specifically, defense counsel argued that the State did not prove the presence of aggravating circumstances with respect to Counts 2-4 (Aggravated Sexual Abuse of a Child) and did not produce sufficient evidence on one count of Tampering with a Witness (Count 8). R.454:205-06. The court sent Counts 2-4 to the jury, reasoning that a reasonable jury could find that Ordiway sought to become better friends with the alleged victim for purposes of committing the offense. R.454:209-10. The court granted defense counsel's motion for a directed verdict with respect to Count 8, but denied it with respect to the remaining counts. R.454:209-12.

At the close of trial, the court instructed the jury on the following elements for Count 5:

> 1. On or about the date charged in the Information the defendant used the Internet or text messaging to solicit, seduce, lure, or entice another person to engage in any sexual activity which is a violation of state criminal law;
> 2. That such other person was a minor;
> 3. That such conduct was done intentionally, knowingly, or recklessly.

R.211; 459:20.The jury returned a guilty verdict on Counts 1, 5 and 7 as charged. R.455:74. With regard to Counts 2-4, the jury found Ordiway guilty of Sexual Abuse of a Child, a lesser included offense of Aggravated Sexual Abuse of a Child. R.455:74. The jury acquitted on Count 6 (Dealing in Harmful Material to a Minor), R.455:74, which was based on the alleged victim's allegation that Ordiway sent her a picture of his penis. R.453:252-53; 455:10.

On January 28, 2014, the court sentenced Ordiway to an indeterminate term of 1-

15 years on Count 1,[4] an indeterminate term of 1-15 years on Counts 2-4, an indeterminate term of 1-15 years on Count 5, and an indeterminate term not to exceed 5 years on Count 6. R.391-93; 457:25-26. The court ordered Count 1 to run consecutive to Counts 2-5, and ordered Count 6 to run consecutive to Count 1 and Counts 2-5. R.391-93; 457:26.

Ordiway filed a timely notice of appeal. R.402-04; 411-12.

STATEMENT OF FACTS

Background

Ordiway lived in Herriman, Utah with his wife of 12 years, Krista. R.453:88-90. The couple had a "rocky" marriage and had previously separated from one another. R.453:121-23. In early 2012, they contemplated filing for a divorce. R.453:122-23. Ordiway and Krista also shared a home with their two young sons and KO, Ordiway's oldest son from a previous marriage. R.453:89; 454:215.

KO, who was an eighth grade student in the spring of 2012, had difficulty making friends at school. R.453:123-24, 173. Ordiway "did [his] best" to help KO make friends and overcome his "awkward[ness]." R. 454:218-19. In February, 2012, KO began dating thirteen-year-old AW. R.453:89-90,150. Like KO, AW also had a difficult time at school as she was "very shy" and bullied by her peers. R.454:76, 106-07.

AW was different from many students her own age; AW claimed she possessed an ability to see and communicate with spirits. R.453:262-64. She also suffered from various

[4] Count 1, Criminal Solicitation of Rape of a Child is a first degree felony. Utah Code §76-4-204. However, the trial court reduced Count 1 to a second degree felony pursuant to Utah Code §76-3-402. R.391-93; 457:20-25.

emotional problems, including depression, an eating disorder, bipolar disorder, and severe anxiety. R.454:26-27, 76, 223. As early as age six, AW entertained thoughts of suicide and sought professional help in the sixth grade. R.454:26-27; 71-72. According to Ordiway, AW even threatened suicide at his home. R.454:248.

At the end of June 2012, AW's parents, Annette and Sam, invited the Ordiways to stay overnight at their home because the family was displaced by a fire in Herriman. R.453:90; 454:58, 220. After this night, AW and KO frequently got together at the Ordiway house. R.453:90-91,151. The Ordiways welcomed AW into their home, and Krista even bought AW her favorite drinks and cooked for her in the evenings. R.453:134-35; 454:18, 268. Ordiway considered AW "one of the kids." R.454:272.

Over the summer, AW expressed that she was unhappy with her own parents. R.454:146, 223-24. She voiced a preference to live with "KO's family [who] would love [her]." State's Ex.59. Alternatively, she wished to live independently in an apartment, but still wanted her parents to drive her to school. R.454:14; State's Ex.59. She told the Ordiways that her parents were "mean" to her, R.454:146-47, 223, and claimed that her dad would beat her and "was on the verge of walking out on her and her mom." R.454:223, 227. In a letter, AW indicated that she hadn't been "happy with her dad . . . since [she] was six." State's Ex.59.

Relationship Between KO, AW, and Ordiway During the Summer of 2012

Ordiway helped KO and AW in various ways. R.453:154, 159; 454:150. Because he had "trouble talking to girls," KO testified that he would tell his dad what he wanted to say to AW, and Ordiway would reword text messages to AW on KO's phone. R.453:128,

178-79. Also, when KO and AW argued, KO would ask his dad to "fix" the situation with AW, who "would storm out and go sit on the swing in the front yard." R.453:159, 178, 218. Ordiway would then go outside, sit on the swing and talk to her. R.453:159. During these conversations, AW testified that Ordiway touched her "sexually" by placing his hand on her mid-thigh. R.453:218-19.

Additionally, Ordiway listened and talked to AW about her problems. R.454:15, 150. At one point, AW explained that she could talk to Ordiway and that he helped her with her depression. R.454:15, 150. AW told a family friend that their friendship was "deeper than a regular friendship" and described Ordiway as someone who was "good looking, [] smelled nice, [and] made a lot of money." R.454:198-200. Ordiway felt "sympathetic" toward AW as he suffered from depression and anxiety himself. R.454:228, 250.

Over the summer, Ordiway and KO learned from AW that her family was having money problems. R.454:29-30, 228. Ordiway provided money for various gifts for AW, including a cell phone and purse, but Ordiway testified that KO reimbursed him for these items. R.453:181-83; 454:25, 231-32. He also bought various items of clothing and accessories for AW, R.453:224-30, some of which he purchased on sale while back-to-school shopping with AW and KO. R.454:233-36. Additionally, Ordiway replaced certain items belonging to AW that KO damaged. R.453:182; 454:25, 231-33. Though AW testified she didn't know Ordiway and KO's "deal" concerning who was responsible for the cost of the gifts, R.454:30, AW claimed that Ordiway took credit for them. R.453:231.

After AW told KO that her only bra gave her a rash and her parents couldn't afford a new one, R.454:29-30, KO, AW, and Ordiway went shopping at Kohl's where Ordiway purchased her a new bra and thong underwear. R.453:165. According to Ordiway and KO, AW picked out the bra and underwear herself, R.453:165, 180; 454:229, but AW claimed Ordiway and KO selected them. R.454:30. Ordiway ensured that Krista and AW's parents knew about these purchases. R.453:137,181; 454:31, 229. In fact, AW told KO that her family was "really grateful for [KO's] family." R.453:180-81; *see also* R.142.

In early August, KO and AW located a dog ("Izzy") being given away for free online. R.453:168-69, 184, 235. KO and AW both wanted a dog, R.453:183-84, and Ordiway decided to take Izzy because she needed a home. R.454:259. AW and KO took "turn[s] [] keeping the dog." R.453:194. AW informed Ordiway and KO that her parents agreed to let her bring Izzy home, R.454:32, 259, but her parents denied giving her permission. R.454:109-10. AW showed all of the gifts purchased by Ordiway to her parents and they did not object. R.453:235-36; 454:29.

At some point that summer, AW claimed that Ordiway started to say things like "I love you" and testified that she began to spend more time with Ordiway than with KO. R.453:217, 245-46. KO described AW and Ordiway as "best friends." R.453:198. He also testified that AW and Ordiway shared "[m]any jokes," one of which involved Ordiway pretending his wet finger was his penis. R.453:155-56. According to Ordiway, AW "invented" the penis joke after he used his wet finger to get her attention. R.454:236-37. Another joke Ordiway was privy to, R.454:55, involved a line from a song: "Hey,

mommy, you sexy." R.453:191. At times, KO complained about the amount of time his dad and AW spent together, R.453:157-58, but Krista texted AW that KO was "just jealous" and that AW was "the daughter [Ordiway was] never going to have." R.453:144-45; *see also* R.135.

Krista Confronts Ordiway

On August 27, 2012, Krista "accus[ed]" Ordiway of "falling for" AW. R.454:244. To an extent, Krista's allegations were motivated by Ordiway's relationship with AW, but Ordiway testified that he and Krista were having problems before. R.454:278-79. Though Krista never saw Ordiway touch AW in a sexual way, she witnessed Ordiway tickling AW and observed AW grab Ordiway's arm and pull him outside. R.453:97-98, 138. She also testified that Ordiway commented on AW's maturity, frequently texted AW, showered more frequently when AW was around, and mentioned how "big" she was for her age after the bra-shopping trip. R.453:93-94, 98, 112. According to Krista, Ordiway asked her why it is wrong if "falling in love" with AW "just happens." R.453:96. But Ordiway testified that he intended to say: "if [AW] has a crush on me, it happens." R.454:243.

On August 28, 2012, Krista checked the phone bill and confronted Ordiway about the text messages sent to AW from his cell phone. R.453:99-111; State's Ex.11 & 62. She told him that texting AW was "wrong" and threatened to leave Ordiway and tell AW's parents. State's Ex.62 at 3, 10, 14; State's Ex.11.

That day, Ordiway testified that he suffered a "breakdown" caused by Krista's accusations, his depression, a demotion at work, and recent news concerning the

deteriorating health of his mother and brother. R.454:250-52. Contemplating suicide, Ordiway wrote a suicide note. R.454:253-54; State's Ex.57. He testified, however, that he changed his mind about ending his life, but took several sleeping pills as a call for his "wife's attention." R.454:253-54. Ordiway was subsequently taken to the hospital, and the police became involved. R.453:111,138-39.

Initial Police Interviews

On August 28, 2012, Detective Peggy Faulkner spoke with AW. R.454:115. AW explained that she and Ordiway were just "good friends," and Krista was overreacting as she was "jealous" of AW. R.454:15,154. She also indicated that Ordiway "act[ed] sexual with her," elaborating that he "tickl[ed]" her—which AW described as "no big deal"—touched her knee, and attempted to kiss her. R.454:116-17, 154-55. When asked about sexual touching, AW only told the detective that Ordiway touched her "knee, if you consider that sexual." R.454:154-55. After the interview, Detective Faulkner spoke with the AW's parents and conveyed her belief that Ordiway was "grooming"[5] AW. R.454:151.

In an interview with KO on August 31, 2012, KO described AW and Ordiway as "best friends." R.453:158; 454:118. He also told the detective that Ordiway touched AW's leg, that Ordiway would not let KO read his texts to AW, and that Ordiway personally texted AW from his phone. R.453:206-07; 454:166. During his interview, KO received a call from Ordiway. R.453:454:162-63. KO explained to the detective that

[5] Detective Faulkner described grooming as giving gifts, "telling someone that they are beautiful, . . . trying to get them to depend on them, and . . . perceive themselves to fall in love with that person, all for [] an end result." R.454:169.

Ordiway told him to say "[he] was texting [AW] . . . when [he] wasn't." R.454:158-59, 163. At trial, KO testified that he was not truthful with the detective because he was angry and maintained that Ordiway did not instruct him to lie about who sent the text messages to AW. R.453:155, 162, 195-96, 205.

After the initial round of interviews, AW spoke with Tiffany Westenkrow, a person AW "love[d]," trusted, and confided in. R.453:261; 454:15, 195-96. AW was complimentary of Ordiway, expressing to Tiffany that "she loved [him]." R.454:201. She described an attempted kiss with Ordiway and indicated that they had discussed marriage. R.454:200-01. Echoing what she told the detective, AW told Tiffany that Krista was a "bitch" who was jealous of her and overreacting. R.454:202-03. AW also thought Krista was a bad mom and wife and believed that she was more of a mother to the Ordiway boys than Krista. R.454:199, 203.

Cell Phone Evidence

The State introduced evidence of text messages that were sent and received from Ordiway's iPhone on August 26-31, 2012. *See* State's Ex.62.[6] The messages exchanged between Ordiway and AW on August 26-28 had been deleted. State's Ex.62. While AW did not remember receiving texts from Ordiway prior to August 28, R.453:267, Ordiway testified that August 25 and 28 were the only dates he texted AW. R.454:274.

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[6] Testimony at trial established that the timestamps and order of the text messages were inaccurate and some messages appeared to be missing. R.453:101-03; 454:184-85, 245. The timestamps were generated by a system synced to Greenwich Mean Time—6 hours later than the time in Utah. R.454:184-85. Additionally, the order of the text messages could have been affected by cell phone reception or the overwriting of deleted texts. R.454:177, 187, 189-90.

KO explained that he used Ordiway's phone to communicate with AW during the August 26-28 timeframe because his own phone was broken. R.453:185-86, 190, 204-05; 454:42. Although KO initially told the police that Ordiway personally texted AW, R.453:154-55, and also claimed that he identified himself before messaging AW, R.453:170, KO testified at trial that all the messages "more or less" came from him. R.453:190-92, 196; *see, e.g.*, R.453:190 (KO claiming he texted AW: "I'll get you to give in one day").

At trial, Ordiway admitted to sending AW various text messages on August 28, 2012. R.454:256-57, 285-86; *see, e.g.*, R.454:285 (admitting to sending: "I'm assuming [that Krista will tell the] cops or your parents . . . I have never admitted to anything so there's no proof"). Ordiway testified that he sent some of the messages because he was "worried" about AW, R.454:247-48, who had stayed home from school on August 28th due to her anxiety. R.454:27; *see also, e.g.*, R.454:247 (admitting to texting AW "I'm here and always will be, I don't care if you need to call me just to talk").

The State presented further evidence that Ordiway entered AW's number in the search tool of a phone-tracking website. R.454:192-94; State's Ex.12. Additionally, police recovered various photographs of AW from Ordiway's work and personal cell phone, one of which pictured AW's chest. R.454:180-82; State's Exhs. 34-44, 63-64.

AW testified that sometime after August 28th, Ordiway sent her a picture of his penis and repeatedly contacted her on her cell phone. R.453:252-54. AW's mom, Annette, also testified that AW was in "constant" contact with a "385" number, which AW identified as belonging to Ordiway. R.454:90-91. But even with technology that

could retrieve deleted messages, police never recovered a penis picture nor any calls or texts from a "385" phone number. R.454:157, 190.

Meeting at the Park

On September 25, 2012, AW and Ordiway met at a park in Herriman. R.453:194-95, 254. According to AW's version of events, she met Ordiway because "he kept asking [her]." R.453:254. Along with Izzy, Ordiway brought AW a pair of sneakers. R.453:254. AW explained that the sneakers were supposed to be a birthday gift from KO and was upset when he did not deliver them personally. R.454:43-44, 262. She did not remember what they discussed, but recalled that Ordiway asked her "[t]o have sex" in his car. R.453:255; 454:93. She testified that Ordiway asked her to have sex before. R.453:255-56.

Ordiway and KO testified that Ordiway went to the park to give AW the dog because it was AW's "turn" to take her. R.453:194-95; 454:260. Ordiway explained that KO planned to check himself out of school during lunch, R.454:280-81, but KO claimed he "got held up at school because [he] got in trouble." R.453:195. Ordiway testified that encountering AW was a surprise because he thought he was meeting KO alone. R.454:260. He explained that they talked for approximately ten minutes about AW's problems from a distance. R.454:261-62. Ordiway denied requesting sex from AW, claiming that sex in his car would have been "impossible" because it was packed with "everything [he] owned." R.454:262-63.

Ultimately, AW's father intervened after he noticed Ordiway's car in the park parking lot. R.454:100-01. Her father testified that he observed Ordiway and AW talking on a bench with the dog. R.454:100-01. He subsequently called the police. R.454:101.

Aftermath of the Park Encounter

After the park encounter, AW's parents sent her to stay with her grandparents in Arizona. R.453:257; 454:103. She initially told her parents that nothing sexual happened with Ordiway. R.454:83-84, 90. At trial, AW testified that her parents were pressuring her to say Ordiway touched her and that she felt similarly pressured by the detective. R.454:44-45. AW explained that she grew afraid of Ordiway because her parents warned that Ordiway would kidnap and rape her. R.454:22-23, 44-45. AW's parents also gave her literature about sexual abuse and grooming. R.454:44-45, 65. During this timeframe, AW told Annette that she heard a spirit that "sound[ed] like [Ordiway] when he talk[ed] to [her]" and was "taking [her] to hell." R.454:48-49; *see also* R.144. AW conveyed her belief that this spirit was "attached to [Ordiway]." *Id.*

AW's Allegations of Sexual Touching

According to Annette, AW ultimately said that Ordiway touched her breasts and vagina, sent her a picture of his penis, and asked AW to have sex with him in the park. R.454:93. At the request of AW's family, a second police interview was held in mid-October 2012. R.454:124. AW told the detective that Ordiway touched her breasts twice, touched her "crotch," and solicited sex at the park. R.454:45, 125, 155-56. The detective remembered AW commenting that she was afraid of Ordiway because of what people

were saying about him. R.454:156. Detective Faulkner further testified that it is not uncommon for interviewees to initially withhold information. R.454:127.

At trial, AW described three occasions between the Herriman fire and August 28, 2012 where Ordiway touched her breasts and one occasion where he touched her "crotch." R.453:240-45. First, she testified that Ordiway kissed her and "cup[ped]" her breast "[o]ver the shirt" while sitting on a bench outside the Ordiway home. R.453:240-41; State's Exs.1-3. AW described at the preliminary hearing that Ordiway touched her breast for approximately thirty seconds without speaking, kissing her, or moving his hand. R.454:36-37.

The second breast-touching incident purportedly took place in Ordiway's car while AW sat in the backseat and Ordiway sat up front. R.454:38-39. As they were waiting for KO, AW alleged that Ordiway "flipped his body like around," kissed her, and "cup[ped]" "[j]ust one" breast skin to skin. R.453:243; 454:38-42. At the preliminary hearing, AW testified that Ordiway attempted to kiss her again while KO loaded his football gear into the car. R.452:78-80; 454:41-42. According to AW, Ordiway wanted KO to know that he wanted AW sexually. R.454:41-42.

Thirdly, AW testified that Ordiway kissed her and "just cupped[7]" her breast "skin to skin" on the front bench outside the Ordiway home. R.453:241-42; 454:33-35. AW could describe few additional details. R.454:34-35. At the October interview and the

[7] AW acknowledged that the prosecutor also used the word "cupped" when questioning her about breast touching. R.454:35.

preliminary hearing, AW discussed only two breast-touching incidents. R.454:33-35. She "just remembered" this particular incident for the first time at trial. R.454:33-35.

AW also testified that Ordiway "touched [her] crotch" on one occasion. R.453:244. She explained that he laid down next to her in the Ordiway's front yard, he "just slid his hand up [her] leg," and his finger touched her "vagina" over the clothes. R.453:244-45. Ordiway denied touching AW in a sexual way. R.454:238. Similarly, KO and Krista never witnessed Ordiway touch AW sexually. R.453:138, 196.

SUMMARY OF ARGUMENT

First, this Court should reverse Ordiway's conviction for Enticement of a Minor because the trial court failed to accurately instruct the jury on the required mental state. To be accurate, the court must specifically instruct the jury regarding the mental state required to commit the charged offense. The Enticement statute provides that a defendant must act "knowingly," but the trial court instructed the jury that the offense could be committed "recklessly." This instruction prejudiced Ordiway because the evidence that Ordiway acted knowingly was not strong, and there was a rational basis for the jury to conclude that he acted recklessly. The trial court's failure to accurately instruct the jury on the elements of the offense constituted error, which merits reversal under the doctrine of ineffective assistance of counsel.

Second, this Court should reverse Ordiway's convictions for Sexual Abuse of a Child and Criminal Solicitation of Rape of a Child on all counts because the State produced insufficient evidence to support his convictions. To satisfy the elements of Sexual Abuse of a Child, the State must show that the defendant, *inter alia*, touched a

child's breasts or vagina. Additionally, to attain a conviction for Criminal Solicitation of Rape of a Child, the State must demonstrate that the defendant solicited a minor to have sex under circumstances strongly corroborative of his intent to do so.

In this case, AW, the sole witness to the alleged crimes, gave testimony so conflicting and biased that it was inherently improbable. The State's additional evidence does not support AW's version of events; at best, it demonstrates that Ordiway took interest in AW, but did not act on it. AW's inherently improbable testimony was insufficient to show that Ordiway touched AW's breasts and vagina and therefore, insufficient to convict him of Sexual Abuse of a Child. Her testimony was also insufficient to show that Ordiway solicited AW to have sex, an essential element of Criminal Solicitation. However, even if Ordiway did solicit AW to have sex, the evidence is still insufficient to support a conviction for Criminal Solicitation because the State failed to show circumstances strongly corroborative of Ordiway's intent to have sex with AW. Because AW's testimony was obviously inherently improbable and uncorroborated, the trial court erred in submitting the case to the jury. Moreover, trial counsel's failure to specifically move for a directed verdict on all counts of Sexual Abuse of a Child and Criminal Solicitation constituted deficient performance that prejudiced Ordiway.

ARGUMENT

I. This Court Should Reverse Ordiway's Conviction For Enticement Of A Minor Because The Trial Court Incorrectly Instructed The Jury That Evidence Of Recklessness Was Sufficient To Satisfy The Mens Rea Element Of The Offense.

Ordiway's conviction for Enticement of a Minor should be reversed because the offense requires that a defendant act "knowingly," but the court instructed the jury that

the offense could be committed "intentionally, knowingly, or *recklessly.*" Under the instruction given, the jury could have incorrectly found that Ordiway was guilty because he recklessly expressed his feelings for AW and jokingly sent her distasteful text messages. This issue can be reached under the doctrine of ineffective assistance of counsel.

"'[I]t is fundamental that the State carries the burden of proving beyond a reasonable doubt each element of an offense.'" *State v. Martinez*, 2000 UT App 320, ¶9, 14 P.3d 114. Jury instructions must "accurately and adequately inform a criminal jury as to the basic elements of the crime charged." *State v. Lucero*, 866 P.2d 1, 3 (Utah Ct. App. 1993). To be accurate, an instruction must "specifically instruct the jury regarding the 'culpable mental state required' to commit the crime." *American Fork v. Carr*, 970 P.2d 717, 720 (Utah Ct. App. 1998). It is "reversible error" to inaccurately instruct the jury on the basic elements of an offense. *State v. Roberts*, 711 P.2d 235, 239 (Utah 1985).

Enticement of a Minor requires that a defendant "knowingly" use text messaging to entice a minor to engage in sexual activity. Utah Code §76-4-401; Addendum B. In this case, the court instructed the jury that a person is guilty of Enticement if "such conduct is done intentionally, knowingly, or *recklessly.*" R.211; 459:20; Addendum C (emphasis added). This Court should reverse because the failure to accurately instruct the jury on the proper mental state constituted error. *See infra* Part I.A. The issue warrants reversal under the doctrine of ineffective assistance of counsel. *See infra* Part I.B.

A. The Trial Court Erred When It Instructed The Jury That Enticement of A Minor Could Be Committed "Recklessly."

The trial court erred by instructing the jury that the mens rea element of Enticement of a Minor could be satisfied by proof of recklessness. Pursuant to Utah Code §76-4-401, "[a] person commits enticement of a minor when the person *knowingly* uses . . . the Internet or text messaging to solicit, seduce, lure, or entice a minor . . . to engage in any sexual activity which is a violation of state criminal law." Utah Code §76-4-401; Addendum B (emphasis added). The statute does not include the term "recklessness" in describing the defendant's mental state.

Instruction No. 35, on the other hand, informed the jury that they could convict Ordiway of Enticement of a Minor if they found the following elements beyond a reasonable doubt:

> 1. On or about the date charged in the Information the defendant used the Internet or text messaging to solicit, seduce, lure, or entice another person to engage in any sexual activity which is a violation of state criminal law;
> 2. That such other person was a minor;
> 3. That such conduct was done intentionally, knowingly, *or recklessly*.

R.211; 459:20; Addendum C (emphasis added).

Under the instruction given, the jury was led to believe that reckless conduct alone was sufficient to find Ordiway guilty of the offense. Recklessness, however, requires a lower degree of culpability than knowledge. *Compare* Utah Code §76-2-103(2) ("A person engages in conduct . . . [k]nowingly . . . with respect to his conduct or to circumstances surrounding his conduct when he is aware of the nature of his conduct or the existing circumstances."), *with* Utah Code §76-2-103(3) ("A person engages in

conduct . . . [r]ecklessly with respect to circumstances surrounding his conduct . . . when he is aware of but consciously disregards a substantial and unjustifiable risk that the circumstances exist"). Therefore, the instruction did not accurately "instruct the jury regarding the 'culpable mental state required' to commit the crime." *Carr*, 970 P.2d at 720.

Nor did the instructions "as a whole" accurately instruct the jury on the required mental state. *Lucero,* 866 P.2d at 3 (explaining that it is not reversible error if the instructions "as a whole . . . fairly instruct the jury on the law"). Although the preceding instruction (Instruction No. 34) informed the jury that "it is a violation of law for a person to *knowingly* use . . . text messaging to . . . entice a minor," it only repeated the relevant portions of the Enticement statute and defined the offense in general terms. R.210; 459:19; Addendum D. *See also State v. Bell*, 770 P.2d 100, 109 n.18 (Utah 1988) ("instructions which merely repeat the statute verbatim may not be adequate").

Read in conjunction, Instructions 34 and 35 could have misled the jury. It is more likely that the jury followed the specific definition set forth in Instruction No. 35, which conformed to the evidence and paired the mental state with the elements of the crime. *See* R.211; 459:20. Indeed, a jury's understanding of the law is better informed by jury instruction language that "appl[ies] narrowly to each applicable . . . element," *State v. Hutchings*, 2012 UT 50, ¶23 n.9, 285 P.3d 1183, and is "tailored to fit the specific legal theory" of the crime charged. *Bell*, 770 P.2d at 109 n.18. Even though the court instructed the jury to construe the instructions "in harmony" and avoid "singl[ing] out" any

particular language, R.182, the jury was not given any guidance on how to deal with the ambiguity surrounding the proper mental state. *See Hutchings*, 2012 UT 50, ¶22.

The potential that the jury applied the incorrect mental state was likely accentuated by instructions containing "abstract statements of the law which [we]re not related to the pertinent facts." *State v. Potter*, 627 P.2d 75, 79 n.3 (Utah 1981). Namely, any belief that recklessness was sufficient to convict was further compounded by the general instruction defining "recklessness." *See* R.194; 459:10; Addendum E (instructing the jury on the definition of "recklessly"); *c.f. State v. Holland*, 2002 UT App 48 at *1 n.1 (instructions accurate as a whole because, among other things, the instructions did not define "recklessly").

The prosecutor and defense counsel further confused the issue in closing arguments. The prosecutor told the jury that Enticement could be "done intentionally, knowingly, or *recklessly*," R.455:10 (emphasis added), but defense counsel explained that Ordiway had to act "knowingly." R.455:49. Along with the jury instructions, the inconsistent statements made in closing arguments left the jury to guess the proper mental state.

Instruction No. 35 taken alone and in combination with the other instructions inaccurately stated the law and could have misled the jury to convict based on recklessness. Therefore, the trial court committed error by advising the jury that Enticement of a Minor could be committed "recklessly."

B. Trial Counsel's Failure To Object To An Instruction That Did Not Accurately Define The Mens Rea Element of Enticement Of A Minor Constituted Ineffective Assistance Of Counsel.

This Court should reverse because counsel's failure to request an instruction on the correct mental state constituted deficient performance that prejudiced Ordiway. To prevail on a claim of ineffective assistance of counsel, Ordiway "'must show (1) that counsel's performance was so deficient as to fall below an objective standard of reasonableness and (2) that but for counsel's deficient performance there is a reasonable probability that the outcome of the trial would have been different.'" *State v. Montoya*, 2004 UT 5, ¶23, 84 P.3d 1183.

1. *Deficient Performance*

First, counsel performed deficiently by failing to object to the inclusion of "recklessness" in the instruction. To establish deficient performance, a defendant "'must identify specific acts or omissions demonstrating that counsel's representation failed to meet an objective standard of reasonableness.'" *Id.* ¶24. If, however, "there exists a 'conceivable tactical basis' for trial counsel's action or inaction, then [this Court] will not consider trial counsel's performance to be constitutionally deficient." *State v. Lewis*, 2014 UT App 241, ¶10, 337 P.3d 1053.

There is no conceivable tactical basis for trial counsel to allow an instruction that incorrectly instructs the jury on the law to the defendant's disadvantage. *See, e.g., id.* ¶13 ("There was no conceivable tactical benefit to Defendant for trial counsel to allow a jury instruction that described the offense in a manner that is inconsistent with the narrow way in which Utah courts have interpreted the applicable statute"). If an action by trial

counsel will benefit the defendant without the threat of corresponding risk, failing to act is an unreasonable choice of trial strategy. *See State v. Franco*, 2012 UT App 200, ¶10, 283 P.3d 1004 (finding no deficient performance when counsel "weighs the risks and benefits of available strategic approaches"). Additionally, there is no strategic basis for counsel's failure to investigate the applicable statutory provisions. *See State v. Moritzsky*, 771 P.2d 688, 691-92 (Utah Ct. App. 1989) (counsel performed deficiently when he "overlooked the statutory presumption by failing to check the 'pocket-part' of the Utah Code").

Here, Ordiway's trial counsel had an opportunity to review the instructions, but affirmatively represented that they had no objections. R.454:290 ("[We] have reviewed the instructions from yesterday, and we don't have any objection to the instructions that you have prepared"); R.454:291 ("The Defense doesn't have any objections to any of the instructions"); R.454:287 ("I don't know that either side objects to the instructions. . . . We are just one big happy family here."). Counsel performed deficiently because their failure to object to the defective instruction appears to be an oversight—not a strategic decision. Indeed, a cursory reading of Utah Code §76-4-401 is sufficient to determine that "knowingly" is the proper mental state. An instruction that conformed to the statutory definition of the offense would have required the State to prove a higher mens rea. There is no conceivable tactical basis for allowing an instruction that made it easier for the jury to convict.

2. *Prejudice*

Second, there was a reasonable probability that, but for counsel's deficient performance, the jury would have had a reasonable doubt respecting Ordiway's guilt. "To show prejudice, a defendant must establish that 'there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt.'" *State v. Walker,* 2010 UT App 157, ¶13, 235 P.3d 766. "'[A] defendant need not show that counsel's deficient conduct *more likely than not* altered the outcome in the case.'" *State v. Moore*, 2012 UT 62, ¶17, 289 P.3d 487 (emphasis in original). "[T]he standard is simply whether there was a reasonable probability, which is 'a probability sufficient to undermine confidence in the outcome.'" *Id.* When examining whether an erroneous instruction on the elements of the offense prejudiced the defendant, this Court "'asks whether the record contains evidence that could rationally lead to a contrary finding with respect to the [erroneous] element.'" *State v. Ochoa*, 2014 UT App 296, ¶5. It also considers "the totality of the evidence, taking into account such factors as whether the errors affect the entire evidentiary picture or have an isolated effect and how strongly the verdict is supported by the record." *State v. Templin*, 805 P.2d 182, 187 (Utah 1990).

In this case, if the court had instructed the jury on the correct mental state, there is a reasonable probability that the jury would have had a reasonable doubt that Ordiway knowingly enticed AW to engage in sexual activity. The State's case for Enticement of a Minor rested on various text messages sent to AW from Ordiway's IPhone. In closing arguments, the prosecutor pointed to text messages where Ordiway calls AW "sexy" and

"tell[s] her he loves her." R.455:9. The prosecutor also directed the jury's attention to the following messages:

> "I'll get you to give in one day :)" (sent August 27, 2012)
>
> "[T]his is making me really sad . . . [b]ecause [AW moving in with a friend or to Arizona] . . . pretty much involve saying goodbye to me" (sent August 28, 2012)
>
> "[I]f you want to your [sic] more than welcome to [stay at the Ordiway home.] . . . [Y]ou know that's where I want you to be is with me always and forever" (sent August 28, 2012)

See R.455:9-10; State's Ex.62 at 1, 9-10. Additionally, the prosecutor told the jury that "[s]uch conduct" could be "done intentionally, knowingly, or *recklessly*." R.455:10 (emphasis added).

To convict Ordiway of Enticement of a Minor, the jury had to find that he "knowingly" used text messaging to solicit or entice AW to engage in unlawful sexual activity. Utah Code §76-4-401; *State v. Gallegos*, 2009 UT 42, ¶16 n.1, 220 P.3d 136, *abrogated on other grounds by Miller v. Utah Dep't of Transp.*, 2012 UT 54, 285 P.3d 1208 ("'[the enticement statute] contains a scienter requirement,' i.e., that the person must 'knowingly' solicit a minor" (alterations in original)). In other words, Ordiway had to be "aware of the nature of his conduct"—that is, aware that he was enticing AW to have sexual relations. Utah Code §76-2-103(2). As demonstrated below, the evidence that Ordiway acted knowingly was not strong and "there was [a] rational basis for the jury to [] conclude[]" that he acted recklessly. *Ochoa*, 2014 UT App 296, ¶7. Accordingly, the jury could have acquitted based on a finding that Ordiway lacked knowledge that his conduct actually amounted to enticement of sexual activity but nevertheless convicted him because they believed his conduct was reckless. *See Walker,*

2010 UT App 157, ¶13 ("To show prejudice, a defendant must establish that 'there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt.'").

First, a finding that Ordiway knowingly solicited or enticed AW to engage in sexual activity is not "strongly . . . supported by the record." *Templin*, 805 P.2d at 187. There was conflicting evidence regarding who actually sent AW the text messages on August 27, 2012. *Compare* R.453:154-55 (KO acknowledging that he initially told the police that Ordiway personally texted AW from his phone), *with* R.453:190, 196 (KO claiming he texted AW: "I'll get you to give in one day"). The jury could have found that KO sent AW the text messages on August 27th and Ordiway sent the messages on August 28th. However, the evidence showing that Ordiway sent the August 28th messages with knowledge that he was enticing sexual activity is weak. On the contrary, the record reveals that Ordiway invited AW to stay at the Ordiway home, complimented her, and told her "I love you" for other reasons.

As an initial matter, the record shows that the jury did not believe Ordiway maintained a friendship with AW for the sole purpose of committing unlawful sexual activity. The State charged Ordiway with Aggravated Sexual Abuse of a Child based on a theory that Ordiway "made friends with [AW] for the purpose of committing" Sexual Abuse of a Child. R.207; 159:15-16. However, the jury convicted Ordiway of the lesser included offense, Sexual Abuse of Child. R.455:74. By finding him guilty of the lesser included offense, the jury must have concluded that Ordiway cultivated a friendship with AW for purposes other than committing unlawful sexual activity. Likewise, the record

suggests that Ordiway texted AW on August 28th for reasons independent of enticing sexual activity.

AW suffered from various emotional problems, including depression, an eating disorder, bipolar disorder, and severe anxiety. R.454:26-27, 76, 223. AW was also "very shy" and was bullied at school. R.454:76, 106-07. Ordiway, who battled depression and anxiety himself, felt "sympathetic" toward AW and helped her cope with her problems. R.454:15, 150, 228, 250. On August 28, 2012, AW's anxiety was so severe that she stayed home from school. R.454:27, 247-48. Ordiway testified he texted AW that day because he "worried about her safety," citing the fact that AW had "threatened suicide at [his] house several times." R.454:247-48. Additionally, AW told the Ordiways that her parents were "mean" to her. R.454:146-47, 223. AW expressed that she was not "happy with her dad" and told Ordiway that her dad would beat her and "was on the verge of walking out" on his family. R.454:223, 227; State's Ex.59. This evidence supports a finding that Ordiway sent text messages on August 28th to lift AW's spirits, strengthen her self-esteem, and provide her with the support that she did not receive from her own family.

The facts also support a finding that Ordiway sent the text messages to fulfill certain non-sexual needs of his own. The jury could have found that Ordiway enjoyed caring for a troubled young girl who was like "the daughter [Ordiway was] never going to have." R.453:144-45; 454:244. He also could have found comfort in a relationship with someone, like AW, who could relate to his problems with anxiety and depression. R.454:15, 150, 250. Furthermore, Ordiway's 12-year relationship with Krista was

"rocky" and the two had separated and considered divorce before meeting AW. R.453:121-23; 454:217-18. At a time when his own relationship with Krista was failing, Ordiway could have enjoyed the attention from AW and the feeling of being needed.

But even if Ordiway was responsible for sending the text messages on August 27, 2012, a jury still could have found that he did not knowingly entice AW to engage in sexual activity. The evidence suggests that many of the texts were not sent seriously. For instance, the text, "I'll get you to give in one day" appears in a conversation where AW and Ordiway repeatedly use the term, "LOL." *See OxfordDictionaries.com*, www.oxforddictionaries.com/us/definition/american_english/LOL (defining "LOL" as an abbreviation for "laugh out loud," a term used "in electronic communication to draw attention to a joke or amusing statement, or to express amusement"); *Dictionary.com*, http://dictionary.reference.com/browse/lol (defining "LOL" as "laughing out loud . . . : used as a response to something funny or as a follow-up to something said only as a joke"). The recurrent use of "LOL" suggests that the statements were made without serious intentions.

In keeping with the tone of the conversation, after Ordiway wrote, "I'll get you to give in one day," he joked that he would start "acting like [B]uddy LOL"—the Ordiways' "dog that would go around humping things." R.453:191; State's Ex.62 at 2. Krista also confronted Ordiway about the way he "joke[d] with [AW] . . . or rather[,] the things [Ordiway] joke[d] about." State's Ex.62 at 14. Meanwhile, KO described that AW and Ordiway shared "many jokes" with one another. R.453:155. In fact, one joke involved a line from a popular song: "Hey, mommy, you sexy." R.454:55; *compare* State's Ex.62 at

2 (Text No. 4520 reading "Hey mommy you sexy"). As AW did not remember receiving texts from Ordiway prior to August 28th, the jury also could have inferred that AW did not find the texts memorable because she did not believe they were sent seriously. R.453:267.[8]

The ambiguous content of the text messages and the context surrounding them further demonstrates that the jury could have convicted Ordiway for acting recklessly rather than knowingly. In some cases, a defendant's knowledge can be easily discerned from the content of the text messages and the context in which they were sent. *See, e.g.*, *Gallegos*, 2009 UT 42, ¶¶2-4 (defendant guilty of enticement where he met a "minor" in a chat room, proposed that the "minor" provide him sexual favors in exchange for the use of his car, engaged him in a graphic sexual conversation, and arranged a meeting); *State v. Canton*, 2013 UT 44, ¶¶4-6, 308 P.3d 517; *State v. Hopkins*, 2009 UT App 165. But this is not a case where the defendant first met a minor online, engaged her in an unequivocally graphic sexual conversation, and arranged a definite meeting. *See id.* Rather, Ordiway had a close, preexisting relationship with AW, and made several distasteful statements in an ambiguous tone. *See* State's Ex.62. And only after AW indicated she needed a place to stay did Ordiway welcome her to stay at his family's home. *See* State's Ex.62 at 7-8.

[8] According to AW's preliminary hearing testimony, Ordiway did not seriously discuss any sexual activity with AW prior to his hospitalization on August 28, 2012—the period in which the Exhibit 62 text messages were sent. R.452:51-52; State's Ex.62. Before Ordiway's hospitalization, she described that their conversations were "not like, Do you want to have sex? [They were] just like sexual jokes that [AW] felt like [she] shouldn't be talking to a 33-year-old about." R.452:51-52. AW "didn't think, like, sexual jokes were like sexually talking to each other." R.452:52.

The jury also could have doubted that Ordiway knowingly enticed AW to have sex in light of the ambiguity caused by electronic communication. *State v. Hawkins*, 967 P.2d 966, 971-72 (Utah Ct. App. 1998) (explaining that a person's mental state may be inferred "'from conduct and attendant circumstances in light of human behavior and experience'"). Many people who communicate electronically can relate to an experience where "bad wording" or lack of context caused the receiving party to misinterpret the sender's intentions. *See* R.454:257 (Ordiway recognizing that the "bad wording" of his text message misrepresented "what [he] was trying to say"). In fact, researchers suggest that actual intentions and emotions are often confused by senders and receivers who communicate electronically. *See, e.g.*, Prashant Bordia, *Face-to-Face Versus Computer-Mediated Communication: A Synthesis of the Experimental Literature*, 34 J. of Bus. Comm. 99, 100 (1997); Kristin Byron, *Carrying too Heavy a Load? The Communication and Miscommunication of Emotion by Email*, 33 Acad. of Mgmt. Rev. 309, 309-10 (2008). The potential for confusion may be heightened where, as here, the order of the text messages is inaccurate and certain messages are missing. R.453:101-03; 454:177, 187-90, 245. Acknowledging the prevalence of electronic miscommunication along with the ambiguous tone and inaccurate order of Ordiway's text messages, the jury could have doubted that Ordiway acted knowingly but nevertheless convicted him because they believed his conduct was reckless.

While evidence showing that Ordiway acted knowingly is not strong, there is "'evidence that could rationally lead'" to a finding that he acted recklessly. *Ochoa*, 2014 UT App 296, ¶7. Indeed, this case is unlike *Ochoa* where this Court found "no rational

basis for the jury to [] conclude[]" that the defendant acted with a less culpable mental state. *Id.* at ¶¶6-7 (finding the defendant was not prejudiced by an instruction that omitted the required mental state). Rather, a finding of recklessness is supported by the evidence in this case.

The jury could have found that he acted "recklessly" because he was aware of, but consciously disregarded the risk that his distasteful text messages amounted to actual enticement of sex. *See* Utah Code §76-2-103(3) ("A person engages in conduct . . . [r]ecklessly with respect to circumstances surrounding his conduct" when he "is aware of but consciously disregards a substantial and unjustifiable risk that the circumstances exist"). Krista even confronted Ordiway explaining that "texting her all the time is wrong." State's Ex.62 at 10. She also told Ordiway that it was "inappropriate for a 30 year old man" to kid about sexual things with AW and to "text[] her to come over rather than [KO]." *Id.* Nevertheless, Ordiway consciously disregarded the risk that his behavior was wrong and continued to text AW. In light of this evidence, the jury could have concluded that Ordiway was aware of, but consciously disregarded the risk that his text messages amounted to actual enticement of sexual activity.

The prosecutor's closing statements likely strengthened this conclusion. In closing argument, the prosecutor told the jury that Enticement of a Minor could be "done intentionally, knowingly, or *recklessly*." R.455:10 (emphasis added). In rebuttal, the prosecutor brought evidence of Ordiway's recklessness to the forefront, stressing multiple times how he proceeded to contact AW after Krista confronted him about his behavior. R.455:63, 69-70. Finally, the erroneous instruction had more than just an

isolated effect; it altered "the entire evidentiary picture" because it allowed the jury to convict based on evidence of recklessness alone. *Templin*, 805 P.2d at 187. Because the evidence that Ordiway acted knowingly was not strong and the jury could have rationally concluded that he acted recklessly, there is a reasonable probability that Ordiway would have enjoyed a more favorable outcome if an accurate instruction was given.

In sum, this Court should reverse because the trial court incorrectly instructed the jury that Enticement of a Minor could be committed recklessly. Trial counsel's failure to object to this erroneous instruction constituted deficient performance that prejudiced Ordiway.

II. This Court Should Reverse Ordiway's Convictions For Sexual Abuse Of A Child And Criminal Solicitation Of Rape Of A Child On All Counts Because The State Produced Insufficient Evidence To Support His Convictions.

Ordiway's convictions for Sexual Abuse of a Child and Criminal Solicitation of Rape of a Child should be reversed on all counts because the State failed to introduce evidence sufficient to support the charged crimes. Specifically, AW's testimony was so inherently improbable that reasonable minds must have entertained a reasonable doubt that Ordiway committed the challenged offenses. This issue may be reached under the doctrines of plain error and ineffective assistance of counsel.

This Court will "'reverse the jury's verdict in a criminal case when'" it concludes "'as a matter of law that the evidence was insufficient to warrant conviction.'" *State v. Gonzales*, 2000 UT App 136, ¶10, 2 P.3d 954. It will "'view the evidence in a light most favorable to the jury verdict,'" and reverse "'if the evidence is so "inconclusive or

inherently improbable that reasonable minds must have entertained a reasonable doubt that the defendant committed the crime."'" *Id.*

Although the burden of establishing insufficiency of the evidence "is high, it is not impossible." *Id.* This court "'will not make speculative leaps across gaps in the evidence.'" *Id.* "'Every element of the crime charged must be proven beyond a reasonable doubt.'" *Id.* And even though "the court must ordinarily accept the jury's determination of witness credibility, when the witness's testimony is inherently improbable, the court may choose to disregard it." *State v. Robbins*, 2009 UT 23, ¶16, 210 P.3d 288. In fact, "[i]n a criminal case . . . the trial court may afford less deference to inherently improbable, inconsistent, uncorroborated witness testimony." *Id.* Indeed, "[a] conviction not based on substantial reliable evidence cannot stand." *Id.* ¶14.

This Court should reverse Ordiway's convictions for Sexual Abuse of a Child and Criminal Solicitation of Rape of a Child because AW's testimony was so inherently improbable, inconsistent, and uncorroborated that reasonable minds must have entertained a reasonable doubt that Ordiway committed these offenses. *See infra* Part II.A. This issue merits reversal under the doctrines of plain error, *see infra* Part II.B, and ineffective assistance of counsel. *See infra* Part II.C.

A. AW's Testimony Was So Inherently Improbable, Inconsistent, and Uncorroborated That Reasonable Minds Must Have Entertained a Reasonable Doubt That Ordiway Committed Sexual Abuse Of A Child And Criminal Solicitation Of Rape Of A Child.

Ordiway's convictions for Sexual Abuse of a Child and Solicitation of Rape of a Child were not based on substantial reliable evidence. To sustain a conviction for Sexual

Abuse of a Child, the State must demonstrate that the defendant "touch[ed] the . . . genitalia of any child [or] the breast of a female child . . . with the intent to arouse or gratify the sexual desire of any person." Utah Code §76-5-404.1(2).

Meanwhile, a person is guilty of Criminal Solicitation of Rape of a Child "if, with intent that [Rape of a Child] be committed, he solicits . . . [a] person to engage in specific conduct that under the circumstances as the actor believes them to be would be [Rape of a Child]." Utah Code §76-4-203(1); *see also* Utah Code §76-5-402.1(1) ("A person commits rape of a child when the person has sexual intercourse with a child who is under the age of 14."); Utah Code §76-4-204(1)(d)(i). The offense "extends to the solicitation of victims who participate in crimes but lack the legal capacity to consent." *State v. Arave*, 2011 UT 84, ¶27 n.11, 268 P.3d 163. Additionally, the solicitation must be "made under circumstances strongly corroborative of the actor's intent that the offense be committed." Utah Code §76-4-203(2).

In this case, AW's presented contradictory, biased and incredibly dubious testimony that was inherently improbable. *See infra* Part II.A.2. Her uncorroborated testimony is insufficient to show that Ordiway touched AW's breasts and genitalia and therefore, committed Sexual Abuse of a Child. *See infra* Part II.A.3. AW's testimony is also insufficient to demonstrate that Ordiway solicited AW to have sex and support a conviction for Criminal Solicitation of Rape of a Child. *See infra* Part II.A.4.i. But even if Ordiway did solicit AW to have sex, the evidence is still insufficient to support a conviction for Criminal Solicitation because the State failed to show circumstances strongly corroborative of Ordiway's intent to have sex with AW. *See infra* Part II.A.4.ii.

1. *The Marshaled Evidence Supporting The Verdict*

When raising an insufficient evidence claim, the defendant "'must marshal the evidence in support of the verdict and then demonstrate that the evidence is insufficient when viewed in the light most favorable to the verdict.'" *State v. Hopkins*, 1999 UT 98, ¶14, 989 P.2d 1065. The marshaling requirement is "a natural extension of an appellant's burden of persuasion," not a ground for procedural default. *State v. Nielsen*, 2014 UT 10, ¶41, 326 P.3d 645.

The State provided the following evidence to support its claim that Ordiway committed three counts of Sexual Abuse of a Child and one count of Criminal Solicitation of Rape of a Child:

1. KO complained about the amount of time his dad and AW spent together. R. R.453:157-58. KO further described a joke that involved Ordiway pretending his wet finger was his penis. R.453:155-56. Additionally, he told the police that AW and Ordiway were "best friends," that Ordiway touched AW's leg, that Ordiway would not let KO read his texts to AW, and that Ordiway personally texted AW from his phone. R.453:158, 205-07; 454:166.

2. Krista observed Ordiway "tickling" AW and witnessed AW pull Ordiway outside from under an awning. R.453:97-98, 138. According to Krista, Ordiway asked her: "why is it wrong if [falling in love with AW] just happens?" R.453:96. She also testified that Ordiway commented on AW's maturity, frequently texted AW, showered more frequently when AW was around, and mentioned how "big" she was for her age after the bra-shopping trip. R.453:93-94, 98, 112. After Krista confronted Ordiway about his relationship with AW, Ordiway attempted suicide. R.454:250-54; State's Ex.11.

3. Ordiway reworded KO's text messages to AW and talked to AW outside the Ordiway home after she and KO argued. R.453:128, 159, 178-79, 218-19. AW testified that Ordiway would touch her thighs during these conversations. R.453:218-19.

4. Ordiway purchased various items for AW, including a bra and thongs. R.453:165,181, 224-35.

5. The State presented an exhibit containing texts sent to AW from Ordiway's iPhone. *See* State's Ex.62; The text message conversations with AW had been deleted. R.454:182-83. *E.g.*, State's Ex.62. at 1 ("I'll get you to give in one day"). KO initially explained to the police that Ordiway personally texted AW and told KO to say "[he] was texting [AW] . . . when [he] wasn't." R.453:154-55; 454:158-59. Ordiway admitted to sending text messages to AW on August 28, 2012. R.454:256-57, 285-86; State's Ex.62.

6. Ordiway visited a phone tracking website and entered AW's number in the search tool. R.454:192-94; State's Ex.12. Police located pictures of AW on Ordiway's cell phones, one of which pictured AW's chest. R.454:180-82; State's Exhs. 34-44, 63-64. AW also claimed Ordiway sent her a picture of his penis and contacted her on her cell phone after August 28, 2012. R.453:252-54.

7. In AW's first police interview, she explained that Ordiway tickled her, attempted to kiss her, and touched her knee. R.454:116-17, 154-55. The detective told AW's parents that Ordiway was "grooming" AW. R.454:151. Shortly after the interview, AW told Tiffany Westenkrow that Ordiway had attempted to kiss her and had discussed marriage with her. R.454:200-01.

8. AW testified that Ordiway "kept asking [her]" to meet with him at the park. R.453:253-54. When AW met Ordiway, he had the dog and a pair of shoes that were a gift for AW. R.453:254. According to AW, Ordiway asked her "[t]o have sex" in his car. R.453:255; 454:93. She alleged that he asked her to have sex before. R.453:255-56. AW's dad observed Ordiway and AW talking on a bench at the park. R.454:100-01.

9. According to Annette, AW revealed that Ordiway touched her breasts, touched her vagina, sent her a picture of his penis, and requested that AW have sex with him in the park. R.454:93. AW alleged the same at a second police interview in mid-October. R.454:45, 125, 155-56. The detective testified that it is not uncommon for interviewees to initially withhold information. R.454:127.

10. At trial, AW described three breast-touching incidents. R.453:240-43. First AW alleged that Ordiway kissed her and "cup[ped]" her breast "[o]ver the shirt," on a bench outside the Ordiway home. R.453:240-41. Second, AW explained that Ordiway "flipped his body like around in the car and kissed me and, like, grabbed my boob, skin to skin with his hand." R.453:243; 454:38-42. Lastly, AW testified that Ordiway "just cupped" her breast "skin to skin" on the bench outside the Ordiway house. R.453:241-42; 454:33-35.

11. AW also testified at trial that Ordiway laid down next to her in the Ordiway's yard and "touched [her] crotch." R.453:244-45. According to AW, Ordiway slid his

hand up [her] leg" and "his finger" touched her "vagina" over the clothes. R.453:245.

As demonstrated below, the marshaled evidence is insufficient to show that Ordiway committed Sexual Abuse of a Child and Criminal Solicitation of Rape of a Child because AW presented inherently improbable testimony that was uncorroborated. Though AW and Ordiway shared many interactions because they were close, the evidence merely suggests that Ordiway took an interest in AW that he did not act on.

2. *AW Presented Incredibly Dubious Testimony that was Inherently Contradictory and the Result of Coercion*

A court may choose to disregard witness testimony when it is "inherently improbable." *Robbins*, 2009 UT 23, ¶13. Inherently improbable evidence is either "(1) physically impossible or (2) apparently false." *Id.* ¶16. Evidence is apparently false when it is "incredibly dubious" or "'where a sole witness presents inherently contradictory testimony that is equivocal or the result of coercion, and there is a complete lack of circumstantial evidence of guilt.'" *Id.* ¶18; *State v. Marks*, 2011 UT App 262, ¶76, 262 P.3d 13. Moreover, "[s]ubstantial inconsistencies in a sole witness's testimony, though not directed at the core offense, can create a situation where the prosecution cannot be said to have proven the defendant's guilt beyond a reasonable doubt." *Robbins*, 2009 UT 23, ¶17.

In this case, AW's testimony "suffered from multiple inconsistencies." *Id.* ¶8. First, AW went from reporting no sexual touching in August 2012 to testifying at Ordiway's September, 2013 trial that Ordiway requested sex from her and touched her sexually on four occasions—one of which she revealed for the first time on the stand. *See*

id. ¶23. In her initial police interview on August 28, 2012, AW only mentioned that Ordiway attempted to kiss her, touched her knee, and "tickl[ed]" her. R.454:116-17, 154-55. She also conveyed her belief that Krista was "jealous" of her and overreacting. R.454:15, 154.

About a week later, AW related a similar story to Tiffany, explaining that Ordiway attempted to kiss her and that Krista was overreacting. R.454:199-201. Even though AW admitted that Tiffany was a person she "love[d]" and could confide in, AW characterized Ordiway as a "good guy" without mentioning any incidents of sexual touching. R.454:15, 195-201. AW also told her parents that nothing sexual occurred between them. R.454:83-84, 90. AW's testimony lacks consistency because she initially told the police, her confidants, and her parents that she did not have any sexual encounters with Ordiway.

Ultimately, she told the police in October, 2012 that Ordiway touched her breasts twice, touched her "crotch," and solicited sex at the park. R.454:45, 125, 155-56. She testified similarly at the preliminary hearing. R.454:155-56. But at trial, AW "just remembered" an entirely new breast-touching incident on the stand. R.453:241-42; 454:33-35. AW's inconsistent accounts concerning the frequency with which the touching occurred further contributes to the inherent improbability of her testimony.

Additionally, AW's testimony was "'lacking in experiential detail,'" *Robbins*, 2009 UT 23, ¶20, because she had difficulty describing the details surrounding the incidents in question. *See, e.g.*, R.453:255 (testifying that she "d[id]n't remember" her conversation with Ordiway at the park where he allegedly solicited sex). AW was particularly vague when asked to relate the details of the breast-touching incident she

revealed for the first time at trial. *See* R.454:34-35 (testifying that she "d[id]n't know" which hand Ordiway used to touch her breast, which breast he touched, or how long the touching lasted). AW also adopted the prosecutor's word "cupped" and used the word each time she described a breast-touching incident. R.453:240-43; 454:33-39.

At some points, AW's testimony "'border[ed] on absurd.'" *Robbins*, 2009 UT 23, ¶20. For instance, AW testified that after Ordiway kissed her, he left his motionless hand on her breast thirty seconds without kissing her, speaking, or moving. R.452:69-70; 454:36-37. She also provided testimony about a separate breast-touching incident that occurred in Ordiway's car. In her description of this incident, AW claimed that Ordiway sat in the driver's seat while AW sat in the backseat even though no one else was in the car. R.454:38-41. Despite this awkward seating situation and the challenging maneuvering entailed, AW testified that Ordiway managed to kiss her, while putting his hand down her shirt and underneath her bra. R.454:38-41. She further testified that Ordiway tried to kiss her again while KO was loading his football gear into the car. R.452:78-80; 454:41-42. According to AW, Ordiway acted this way because he wanted KO to know that he wanted AW sexually. R.454:41-42.

AW also had a motive to fabricate, and there was evidence that AW's testimony was the "'result of coercion.'" *Robbins*, 2009 UT 23, ¶18. AW admitted at trial that her parents put a lot of pressure on her to allege that Ordiway touched her inappropriately. R.454:44-45. AW's parents even told her that Ordiway would kidnap and rape her, which scared AW. R.454:22-23, 44-45. She also felt additional pressure from the police to make allegations. R.454:44-45. AW's fears were likely exacerbated by the literature about

sexual abuse and grooming she received from her parents. R.454:44-45, 65. In fact, the detective remembered AW commenting that she was afraid of Ordiway because of what people were saying about him. R.454:156.

Around the time AW's parents told her that Ordiway would kidnap and rape her, AW started hearing a spirit that sounded like Ordiway. R.144; 454:48-49. AW described that this spirit was "taking [her] to hell [and] he sound[ed] like Ordiway when he talk[ed] to [her]." R.144; 454:48-49. AW further testified that this spirit would get "really scary," tell her she would "pay," and "walk[] around . . . slamming things and making weird noises." R.144; 454:48-49. She believed this spirit was "attached to Ordiway." R.144; 454:49. AW's supernatural experiences likely contributed to her fear of Ordiway and created further motive to fabricate.

As a final note, the record shows that the jury must have questioned AW's credibility. By acquitting Ordiway of Dealing in Content Harmful to a minor, they must have doubted the truthfulness of AW's claim that Ordiway sent her a picture of his penis. R.455:74.

3. *The State's Evidence is Insufficient to Demonstrate that Ordiway Committed Sexual Abuse of a Child*

The evidence was insufficient to convict Ordiway of three counts of Sexual Abuse of a Child because the State failed to demonstrate that Ordiway touched the genitalia and breasts of AW. *See* Utah Code §76-5-404.1(2). Evidence may be deemed insufficient to sustain a conviction "in cases 'where a sole witness presents inherently contradictory

testimony that is equivocal or the result of coercion, and there is a complete lack of circumstantial evidence of guilt.'" *Robbins*, 2009 UT 23, ¶18.

As demonstrated, AW presented incredibly dubious testimony that was inherently contradictory and the result of coercion. *See supra* Part II.A.2. Additionally, the State failed to produce any circumstantial evidence that Ordiway touched AW's breasts and vagina. Although AW described several incidents of sexual touching that took place in the front of the Ordiway home, R.453:240-45; State's Exs. 1-3, no one witnessed Ordiway touch AW's breasts or vagina. R.453:138, 196. KO and Krista only witnessed Ordiway tickle and touch AW on her leg, but never any sexual touching despite their close proximity to the location where the alleged touching occurred. R.453:97-98, 138, 206-07.

Moreover, none of the text messages retrieved from Ordiway's phone referenced touching AW's breasts or vagina. *See* State's Ex.62. Even assuming Ordiway sent AW all of the text messages introduced at trial, they only reveal that Ordiway took an interest in AW that he did not act on. *See supra* Part I.B.2; State's Ex.62. The evidence that Ordiway deleted the text messages to AW also fails to demonstrate guilt; it is uncertain as to whether he deleted the messages. But even if he did, the evidence shows that he was fearful Krista would overreact. *See* R.454:244, 278-79.

Additionally, the record demonstrates that Ordiway bought AW gifts because he cared for her and because her family was having financial problems. R.454:29-30, 228. Lastly, Ordiway's suicide attempt after Krista confronted him about AW only reveals, if anything, that Ordiway was depressed and believed that his marriage with Krista was

beyond repair. R.454:250-54; *see also Pettie v. State*, 560 A.2d 577, 582 (Md. 1989) ("attempted suicide cannot easily be circumscribed, as that act is subject to innumerable interpretations"). As a whole, while the evidence indicates that Ordiway had feelings for AW, if fails to establish that he acted on them.

In sum, the State's evidence that Ordiway touched AW's breasts and vagina was so "inherently improbable that reasonable minds must have entertained a reasonable doubt that [Ordiway] committed the crime[s]." *Gonzales*, 2000 UT App 136, ¶10 (internal quotation marks omitted). There were multiple "material inconsistencies in the testimony" provided by AW as well as evidence that her testimony was the "'result of coercion.'" *Robbins*, 2009 UT 23, ¶18-19. And there was "no other circumstantial or direct evidence of the defendant's guilt" because the evidence only reveals that Ordiway harbored affection for AW that he did not act on. *Id.* The State therefore failed to prove that Ordiway committed Sexual Abuse of a Child on all counts.

4. *The Evidence is Insufficient to Support the State's Claim that Ordiway Committed Criminal Solicitation of Rape of a Child*

The State's evidence is insufficient to convict Ordiway of Criminal Solicitation of Rape of a Child because it failed to demonstrate that Ordiway solicited AW to engage in sexual intercourse. *See* Utah Code §76-4-203(1); §76-5-402.1(1); §76-4-204(1)(d)(i). Alternatively, the evidence is insufficient to show that the solicitation was made under circumstances that were strongly corroborative of Ordiway's intent to have sex with AW.

i. The evidence is insufficient to show that Ordiway asked AW to have sex

First, the State's evidence was insufficient to show that Ordiway actually asked AW to have sex because AW presented incredibly dubious testimony that was inherently contradictory and the result of coercion. *See supra* Part II.A.2. Additionally, there was "no other circumstantial or direct evidence" that Ordiway solicited sex from AW. *Robbins*, 2009 UT 23, ¶19.

Although AW claimed that Ordiway repeatedly texted her after August 28th and "kept asking [her]" to meet him at the park, police could not locate any incoming calls or texts from Ordiway after this date—even with technology that could retrieve deleted messages. R.453:253-54; 454:157,190. Meanwhile, the text messages sent prior to August 28th only show that Ordiway took an interest in AW and made distasteful jokes. *See supra* Part I.B.2; State's Ex.62. AW also claimed that Ordiway sent her a picture of his penis after his hospitalization on August 28th. R.453:252-53. But again, such a picture was never recovered, and the jury ultimately acquitted Ordiway of Dealing in Harmful Material to a Minor. R.454:157, 190; 455:74. Additionally, the evidence suggests that Ordiway bought presents for AW because her family faced financial problems and he cared for her. R.454:29-30, 228. As mentioned above, the State's evidence only reveals that Ordiway showed a fondness for AW that he did not act on.

ii. Alternatively, the State failed to show circumstances strongly corroborative of Ordiway's intent to have sex with AW

Even if Ordiway did ask AW to have sex, the evidence is still insufficient to support a conviction for Criminal Solicitation because the State did not show

circumstances strongly corroborative of Ordiway's intent to have sex with AW. "The requirement of corroborating evidence ensures that a conviction will not result from an accused's statements that were . . . not intended to be taken seriously or upon fabricated testimony of the person allegedly solicited." *State v. Williams*, 315 N.W.2d 45, 58 (Iowa 1982).

In this case, corroborating evidence was lacking. First, Ordiway's text messages—for instance "I'll get you to give in one day"—fail to demonstrate intent because the evidence suggests that these statements were made jokingly. *See supra* Part I.B.2; State's Ex.62. And as discussed, the police failed to recover evidence of more direct sexual advances, such as text messages requesting sex or a picture of his penis. R.454:157, 190; *see also United States v. Hale*, 448 F.3d 971, 983 (7th Cir. 2006) (listing "repeatedly soliciting" as a circumstance strongly corroborative of intent).

Moreover, there is no evidence that Ordiway prepared for or planned the details of a sexual encounter with AW. *See Hale*, 448 F.3d at 983 (listing "acquiring [] tools . . . for use in committing the offense, or making other apparent preparations for its commission" as a circumstance strongly corroborative of intent). Though AW claimed that Ordiway wanted to have sex in his car, it was daytime and his car was visible from the road. R.454:100-01; 261. In any event, Ordiway testified that his car was filled with his belongings and sex would be "impossible." R.454:262-63.

Furthermore, the evidence fails to suggest that Ordiway brought Izzy and the sneakers to the park for purposes of sexual temptation. As AW partly-owned the dog, Ordiway brought Izzy to the park because it was AW's "turn" to take care of her.

R.453:194-95; 454:260. Additionally, the shoes were a gift promised to AW from KO. R.454:43-44, 262. Lastly, the fact that AW's dad witnessed Ordiway and AW alone in the park fails to provide sufficient corroboration because it merely shows opportunity. *See Sheffield v. State*, 847 S.W.2d 251, 260 (Tex. App. 1992) ("Evidence which merely goes to show motive or opportunity of the accused to commit the crime is insufficient [] corroborat[ion].").

In sum, AW's inherently improbable testimony was uncorroborated and therefore, failed to supply evidence sufficient to demonstrate that Ordiway asked AW to have sex. Alternatively, the State failed to show circumstances that "strongly corroborat[ed]" Ordiway's intent to have sex with AW. *See* Utah Code §76-4-203(2). Accordingly, the State failed to produce sufficient evidence to demonstrate that Ordiway committed Criminal Solicitation of Rape of a Child.

B. The Trial Court's Decision To Submit All Counts of Sexual Abuse Of A Child And Criminal Solicitation Of Rape Of A Child To The Jury Constituted Plain Error.

To demonstrate plain error with respect to an insufficient evidence challenge, the defendant must establish that (1) "that the evidence was insufficient to support [his] conviction" and (2) "that the insufficiency was so obvious and fundamental that the trial court erred in submitting the case to the jury." *State v. Holgate*, 2000 UT 74, ¶17, 10 P.3d 346.

As shown, the evidence was insufficient to support Ordiway's convictions for Sexual Abuse of a Child and Criminal Solicitation of Rape of a Child on all counts. *See supra* Part II.A. And AW's testimony was obviously inherently improbable because, as

argued above, the sole witness to the crimes provided clearly biased testimony with obvious material inconsistencies and the testimony was unsupported by direct or circumstantial evidence. *See supra* Part II.A.2; *see also, e.g.*, R.452:21-23; 453:241-42; 454:33-35 (AW describing two-breast touching incidents to the police and at the preliminary hearing, but testifying to a third breast touching incident at trial); R.454:44-45 (AW admitting at trial that her parents put a lot of pressure on her to allege that Ordiway touched her inappropriately).

Because AW's testimony was obviously inherently improbable, it should have been clear that the State's evidence was insufficient to show that Ordiway touched AW's breasts and vagina, *see supra* Part II.A.3, and solicited sex. *See supra* Part II.A.4.i. But even if Ordiway did solicit sex, it was obvious that the State's deficient evidence failed to strongly corroborate Ordiway's intent to have sex with AW. *See supra* Part II.A.4.ii. Because these insufficiencies were "so obvious and fundamental," the trial court erred in submitting the case to the jury. *Holgate*, 2000 UT 74, ¶17. Accordingly, this Court should reverse Ordiway's convictions for Sexual Abuse of a Child and Criminal Solicitation of Rape of a Child on all counts.

C. Trial Counsel's Failure To Specifically Move For A Directed Verdict On All Counts Of Sexual Abuse Of A Child And Criminal Solicitation Of Rape Of A Child Constituted Ineffective Assistance Of Counsel.

As previously discussed, *see supra* Part I.B, a defendant will prevail on an ineffective assistance of counsel claim when he shows that "'counsel's performance was so deficient as to fall below an objective standard of reasonableness'" and "'but for

counsel's deficient performance there is a reasonable probability that the outcome of the trial would have been different.'" *Montoya*, 2004 UT 5, ¶23.

In this case, counsel performed deficiently by failing to specifically request a directed verdict based on insufficient evidence showing that Ordiway touched AW's breasts and vagina and solicited sex under circumstances strongly corroborative of his intent to have sex. Trial counsel's "general motion for a directed verdict," *see* R.454:205, failed to specifically draw the court's attention to the State's insufficient evidence of these elements. *See State v. Meza*, 2011 UT App 260, ¶4, 263 P.3d 424 ("'Utah courts require specific objections in order to bring all claimed errors to the trial court's attention to give the court an opportunity to correct the errors if appropriate.'").

As mentioned, if an action by trial counsel will only benefit the defendant, failing to act is an unreasonable choice of trial strategy. *See Franco*, 2012 UT App 200, ¶10 (finding no deficient performance where counsel "weighs the risks and benefits of available strategic approaches"). A motion for a directed verdict that specifically pointed out these insufficiencies would only have benefited Ordiway. Accordingly, counsel performed deficiently because there was "'no conceivable tactical basis'" for counsel's failure to specifically move for a directed verdict based on insufficient evidence of these elements. *Lewis*, 2014 UT App 241, ¶13.

Secondly, there is a reasonable probability that the outcome of the trial would have been different but for trial counsel's failure to move to dismiss for insufficient evidence. As demonstrated, the State's evidence was insufficient to show that Ordiway touched AW's breasts and vagina, *see supra* Part II.A.3, and solicited sex under circumstances

strongly corroborative of his intent to have sex with AW. *See supra* Part II.A.4.i-ii. Defense counsel, however, did not specifically move to dismiss all counts of Sexual Abuse of a Child and Criminal Solicitation for insufficient evidence. Through this omission, defense counsel prejudiced Ordiway by ensuring his case was given to the jury for consideration, even though there was insufficient evidence to support these charges. Therefore, this Court should reverse because counsel's failure to specifically move for a directed verdict on all counts of Sexual Abuse of a Child and Criminal Solicitation of Rape of a Child was deficient performance that prejudiced Ordiway.

CONCLUSION

For the reasons set forth herein, Ordiway respectfully requests that this Court reverse his convictions for Enticement of a Minor, Sexual Abuse of a Child, and Criminal Solicitation of Rape of a Child and remand for a new trial.

SUBMITTED this 2 day of January, 2015.

ALEXANDRA S. McCALLUM
Attorney for Defendant/Appellant

CERTIFICATE OF DELIVERY

I, ALEXANDRA S. McCALLUM, hereby certify that I have caused to be hand-delivered an original and 7 copies of the foregoing to the Utah Court of Appeals, 450 South State Street, 5th Floor, Salt Lake City, Utah 84114; and 4 copies to the Attorney General's Office, Heber M. Wells Building, 160 East 300 South, 6th Floor, Salt Lake City, Utah 84114, this 2 day of January, 2015.

ALEXANDRA S. McCALLUM

CERTIFICATE OF COMPLIANCE

In compliance with the type-volume limitation of Utah R. App. P. 24(f)(1), I certify that this brief contains 13,118 words, excluding the table of contents, table of authorities, addenda, and certificates of compliance and delivery. In compliance with the typeface requirements of Utah R. App. P. 27(b), I certify that this brief has been prepared in a proportionally spaced font using Microsoft Word 2010 in Times New Roman 13 point.

ALEXANDRA S. McCALLUM

DELIVERED to the Utah Attorney General's Office and the Utah Court of Appeals as indicated above this 2 day of January, 2015.

INDEX TO ADDENDA

Tab A

3RD DIST. COURT - WEST JORDAN
SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH, Plaintiff,	:	MINUTES SENTENCING APP SENTENCE, JUDGMENT, COMMITMENT
vs. KRIS DAVID ORDIWAY, Defendant. Custody: Salt Lake County Jail	:	Case No: 121401199 FS Judge: BRUCE LUBECK Date: January 28, 2014

PRESENT
Clerk: rhondam
Prosecutor: GREEN, STEVEN J
Defendant

DEFENDANT INFORMATION
Date of birth: April 16, 1979
Sheriff Office#: 286251
Audio
Tape Number: Courtroom 32 Tape Count: 1:31-2:15:56

CHARGES
1. CRIMINAL SOLICITATION (402 amended) - 1st Degree Felony
Plea: Guilty - Disposition: 09/06/2013 Guilty
2. SEXUAL ABUSE OF A CHILD - 2nd Degree Felony
Plea: Guilty - Disposition: 09/06/2013 Guilty
3. SEXUAL ABUSE OF A CHILD - 2nd Degree Felony
Plea: Guilty - Disposition: 09/06/2013 Guilty
4. SEXUAL ABUSE OF A CHILD - 2nd Degree Felony
Plea: Guilty - Disposition: 09/06/2013 Guilty
5. ENTICING A MINOR OVER THE INTERNET - 2nd Degree Felony
Plea: Guilty - Disposition: 09/06/2013 Guilty
7. TAMPERING WITH A WITNESS - 3rd Degree Felony
Plea: Guilty - Disposition: 09/06/2013 Guilty

HEARING

Court is considering reducing Count 1 under 76-3-402, but has given counsel time to submit a Sentencing Memorandum regarding the charge.

Counsel have submitted their memorandums.

Counsel for the defendant argues on behalf of the defendant to reduce count 1.

1:42 Sam Webb, father of the Victim speaks in re of sentencing.
1:47 State responds to defendant's arguments.
1:59 Counsel for the Defendant's reply.

After review of arguments the Court finds that during sentence the Court finds it is unduly harsh to sentence defendant to a First

Degree Felony as to Count 1 for what the statute calls for. Under the facts of this case The Court is entering a conviction as a first degree felony, but Court Orders Count 1 amended to a Second Degree Felony for sentencing.

SENTENCE PRISON

Based on the defendant's conviction of CRIMINAL SOLICITATION a 1st Degree Felony, the defendant is sentenced to an indeterminate term of not less than one year nor more than fifteen years in the Utah State Prison.

Based on the defendant's conviction of SEXUAL ABUSE OF A CHILD a 2nd Degree Felony, the defendant is sentenced to an indeterminate term of not less than one year nor more than fifteen years in the Utah State Prison.

Based on the defendant's conviction of SEXUAL ABUSE OF A CHILD a 2nd Degree Felony, the defendant is sentenced to an indeterminate term of not less than one year nor more than fifteen years in the Utah State Prison.

Based on the defendant's conviction of SEXUAL ABUSE OF A CHILD a 2nd Degree Felony, the defendant is sentenced to an indeterminate term of not less than one year nor more than fifteen years in the Utah State Prison.

Based on the defendant's conviction of ENTICING A MINOR OVER THE INTERNET a 2nd Degree Felony, the defendant is sentenced to an indeterminate term of not less than one year nor more than fifteen years in the Utah State Prison.

Based on the defendant's conviction of TAMPERING WITH A WITNESS a 3rd Degree Felony, the defendant is sentenced to an indeterminate term of not to exceed five years in the Utah State Prison.

COMMITMENT is to begin immediately.

To the SALT LAKE County Sheriff: The defendant is remanded to your custody for transportation to the Utah State Prison where the defendant will be confined.

SENTENCE PRISON CONCURRENT/CONSECUTIVE NOTE

Court Orders Count 1 to run consecutive to Counts 2-5. Count 6 to run consecutive to counts 1 and 2-5.

402 DECREASE

BC

The motion to enter ~~judgment~~ sentence pursuant to 76-3-402, U.C.A. for the charge of CRIMINAL SOLICITATION, is granted.
Charge severity decreased from 1st Degree Felony to 2nd Degree Felony.

CUSTODY

The defendant is present in the custody of the Salt Lake County jail.

Date: 28 Jan 2014

BRUCE [illegible]
District Court Judge

STATE OF UTAH THIRD DISTRICT COURT WEST JORDAN

000039

Tab B

West's Utah Code Annotated
Title 76. Utah Criminal Code
Chapter 4. Inchoate Offenses (Refs & Annos)
Part 2. Criminal Conspiracy

U.C.A. 1953 § 76-4-203

§ 76-4-203. Criminal solicitation--Elements

Currentness

(1) An actor commits criminal solicitation if, with intent that a felony be committed, he solicits, requests, commands, offers to hire, or importunes another person to engage in specific conduct that under the circumstances as the actor believes them to be would be a felony or would cause the other person to be a party to the commission of a felony.

(2) An actor may be convicted under this section only if the solicitation is made under circumstances strongly corroborative of the actor's intent that the offense be committed.

(3) It is not a defense under this section that the person solicited by the actor:

(a) does not agree to act upon the solicitation;

(b) does not commit an overt act;

(c) does not engage in conduct constituting a substantial step toward the commission of any offense;

(d) is not criminally responsible for the felony solicited;

(e) was acquitted, was not prosecuted or convicted, or was convicted of a different offense or of a different type or degree of offense; or

(f) is immune from prosecution.

(4) It is not a defense under this section that the actor:

(a) belongs to a class of persons that by definition is legally incapable of committing the offense in an individual capacity; or

(b) fails to communicate with the person he solicits to commit an offense, if the intent of the actor's conduct was to effect the communication.

(5) Nothing in this section prevents an actor who otherwise solicits, requests, commands, encourages, or intentionally aids another person to engage in conduct which constitutes an offense from being prosecuted and convicted as a party to the offense under Section 76-2-202 if the person solicited actually commits the offense.

Credits

Laws 1990, c. 189, § 1; Laws 1993, c. 230, § 1; Laws 2013, c. 278, § 59, eff. May 14, 2013.

Notes of Decisions (8)

U.C.A. 1953 § 76-4-203, UT ST § 76-4-203
Current through 2014 General Session.

End of Document

West's Utah Code Annotated
Title 76. Utah Criminal Code
Chapter 4. Inchoate Offenses (Refs & Annos)
Part 2. Criminal Conspiracy

U.C.A. 1953 § 76-4-204

§ 76-4-204. Criminal solicitation--Penalties

Currentness

(1) Criminal solicitation to commit:

(a) a capital felony, or a felony punishable by imprisonment for life without parole, is a first degree felony;

(b) except as provided in Subsection (1)(c) or (d), a first degree felony is a second degree felony;

(c) any of the following offenses is a first degree felony punishable by imprisonment for an indeterminate term of not fewer than three years and which may be for life:

(i) murder, Subsection 76-5-203(2)(a);

(ii) child kidnapping, Section 76-5-301.1; or

(iii) except as provided in Subsection (1)(d), any of the felonies described in Title 76, Chapter 5, Part 4, Sexual Offenses, that are first degree felonies;

(d) except as provided in Subsection (2), any of the following offenses is a first degree felony, punishable by a term of imprisonment of not less than 15 years and which may be for life:

(i) rape of a child, Section 76-5-402.1;

(ii) object rape of a child, Section 76-5-402.3; or

(iii) sodomy on a child, Section 76-5-403.1;

(e) a second degree felony is a third degree felony; and

(f) a third degree felony is a class A misdemeanor.

(2) If, when imposing a sentence under Subsection (1)(d), a court finds that a lesser term than the term described in Subsection (1)(d) is in the interests of justice and states the reasons for this finding on the record, the court may impose a term of imprisonment of not less than:

(a) 10 years and which may be for life;

(b) six years and which may be for life; or

(c) three years and which may be for life.

Credits

Laws 1990, c. 189, § 2; Laws 2008, c. 179, § 2, eff. May 5, 2008.

Notes of Decisions (4)

U.C.A. 1953 § 76-4-204, UT ST § 76-4-204
Current through 2014 General Session.

End of Document

West's Utah Code Annotated
Title 76. Utah Criminal Code
Chapter 4. Inchoate Offenses (Refs & Annos)
Part 4. Enticement of a Minor

U.C.A. 1953 § 76-4-401

§ 76-4-401. Enticing a minor--Elements--Penalties

Currentness

(1) As used in this section:

(a) "Minor" means a person who is under the age of 18.

(b) "Text messaging" means a communication in the form of electronic text or one or more electronic images sent by the actor from a telephone, computer, or other electronic communication device to another person's telephone, computer, or other electronic communication device by addressing the communication to the person's telephone number or other electronic communication access code or number.

(2)(a) A person commits enticement of a minor when the person knowingly uses the Internet or text messaging to solicit, seduce, lure, or entice a minor, or to attempt to solicit, seduce, lure, or entice a minor, or another person that the actor believes to be a minor, to engage in any sexual activity which is a violation of state criminal law.

(b) A person commits enticement of a minor when the person knowingly uses the Internet or text messaging to:

(i) initiate contact with a minor or a person the actor believes to be a minor; and

(ii) subsequently to the action under Subsection (2)(b)(i), by any electronic or written means, solicits, seduces, lures, or entices, or attempts to solicit, seduce, lure, or entice the minor or a person the actor believes to be the minor to engage in any sexual activity which is a violation of state criminal law.

(3) It is not a defense to the crime of enticing a minor under Subsection (2), or an attempt to commit this offense, that a law enforcement officer or an undercover operative who is working with a law enforcement agency was involved in the detection or investigation of the offense.

(4) Enticement of a minor under Subsection (2)(a) or (b) is punishable as follows:

(a) enticement to engage in sexual activity which would be a first degree felony for the actor is a:

(i) second degree felony upon the first conviction for violation of this Subsection (4)(a); and

(ii) first degree felony punishable by imprisonment for an indeterminate term of not fewer than three years and which may be for life, upon a second or any subsequent conviction for a violation of this Subsection (4)(a);

(b) enticement to engage in sexual activity which would be a second degree felony for the actor is a third degree felony;

(c) enticement to engage in sexual activity which would be a third degree felony for the actor is a class A misdemeanor;

(d) enticement to engage in sexual activity which would be a class A misdemeanor for the actor is a class B misdemeanor; and

(e) enticement to engage in sexual activity which would be a class B misdemeanor for the actor is a class C misdemeanor.

(5)(a) When a person who commits a felony violation of this section has been previously convicted of an offense under Subsection (5)(b), the court may not in any way shorten the prison sentence, and the court may not:

(i) grant probation;

(ii) suspend the execution or imposition of the sentence;

(iii) enter a judgment for a lower category of offense; or

(iv) order hospitalization.

(b) The sections referred to in Subsection (5)(a) are:

(i) Section 76-4-401, enticing a minor;

(ii) Section 76-5-301.1, child kidnapping;

(iii) Section 76-5-402, rape;

(iv) Section 76-5-402.1, rape of a child;

(v) Section 76-5-402.2, object rape;

(vi) Section 76-5-402.3, object rape of a child;

(vii) Subsection 76-5-403(2), forcible sodomy;

(viii) Section 76-5-403.1, sodomy on a child;

(ix) Section 76-5-404, forcible sexual abuse;

(x) Section 76-5-404.1, sexual abuse of a child and aggravated sexual abuse of a child;

(xi) Section 76-5-405, aggravated sexual assault;

(xii) any offense in any other state or federal jurisdiction which constitutes or would constitute a crime in Subsections (5)(b)(i) through (xi); or

(xiii) the attempt, solicitation, or conspiracy to commit any of the offenses in Subsections (5)(b)(i) through (xii).

Credits

Laws 2001, c. 353, § 1, eff. April 30, 2001; Laws 2003, c. 164, § 1, eff. May 5, 2003; Laws 2007, c. 337, § 1, eff. Mar. 19, 2007; Laws 2008, c. 342, § 1, eff. May 5, 2008; Laws 2013, c. 175, § 1, eff. May 14, 2013; Laws 2013, c. 278, § 60, eff. May 14, 2013.

Notes of Decisions (10)

U.C.A. 1953 § 76-4-401, UT ST § 76-4-401
Current through 2014 General Session.

End of Document

West's Utah Code Annotated
Title 76. Utah Criminal Code
Chapter 5. Offenses Against the Person (Refs & Annos)
Part 4. Sexual Offenses (Refs & Annos)

U.C.A. 1953 § 76-5-402.1

§ 76-5-402.1. Rape of a child

Currentness

(1) A person commits rape of a child when the person has sexual intercourse with a child who is under the age of 14.

(2) Rape of a child is a first degree felony punishable by a term of imprisonment of:

(a) except as provided in Subsection (2)(b), not less than 25 years and which may be for life; or

(b) life without parole, if the trier of fact finds that:

(i) during the course of the commission of the rape of a child, the defendant caused serious bodily injury to another; or

(ii) at the time of the commission of the rape of a child the defendant was previously convicted of a grievous sexual offense.

(3) Subsection (2)(b) does not apply if the defendant was younger than 18 years of age at the time of the offense.

(4) Imprisonment under this section is mandatory in accordance with Section 76-3-406.

Credits

Laws 1983, c. 88, § 18; Laws 1995, c. 337, § 5, eff. May 1, 1995; Laws 1995, 1st Sp.Sess., c. 10, § 6, eff. April 29, 1996; Laws 1996, c. 40, § 7, eff. April 29, 1996; Laws 2007, c. 339, § 13, eff. April 30, 2007; Laws 2008, c. 179, § 3, eff. May 5, 2008; Laws 2013, c. 81, § 5, eff. May 14, 2013.

Notes of Decisions (43)

U.C.A. 1953 § 76-5-402.1, UT ST § 76-5-402.1
Current through 2014 General Session.

End of Document

West's Utah Code Annotated
Title 76. Utah Criminal Code
Chapter 5. Offenses Against the Person (Refs & Annos)
Part 4. Sexual Offenses (Refs & Annos)

U.C.A. 1953 § 76-5-404.1

§ 76-5-404.1. Sexual abuse of a child--Aggravated sexual abuse of a child

Currentness

(1) As used in this section:

(a) "Adult" means an individual 18 years of age or older.

(b) "Child" means an individual under the age of 14.

(c) "Position of special trust" means:

(i) an adoptive parent;

(ii) an athletic manager who is an adult;

(iii) an aunt;

(iv) a babysitter;

(v) a coach;

(vi) a cohabitant of a parent if the cohabitant is an adult;

(vii) a counselor;

(viii) a doctor or physician;

(ix) an employer;

(x) a foster parent;

(xi) a grandparent;

(xii) a legal guardian;

(xiii) a natural parent;

(xiv) a recreational leader who is an adult;

(xv) a religious leader;

(xvi) a sibling or a stepsibling who is an adult;

(xvii) a scout leader who is an adult;

(xviii) a stepparent;

(xix) a teacher or any other person employed by or volunteering at a public or private elementary school or secondary school, and who is 18 years of age or older;

(xx) an uncle;

(xxi) a youth leader who is an adult; or

(xxii) any person in a position of authority, other than those persons listed in Subsections (1)(c)(i) through (xxi), which enables the person to exercise undue influence over the child.

(2) A person commits sexual abuse of a child if, under circumstances not amounting to rape of a child, object rape of a child, sodomy on a child, or an attempt to commit any of these offenses, the actor touches the anus, buttocks, or genitalia of any child, the breast of a female child, or otherwise takes indecent liberties with a child, or causes a child to take indecent liberties with the actor or another with intent to cause substantial emotional or bodily pain to any person or with the intent to arouse or gratify the sexual desire of any person regardless of the sex of any participant.

(3) Sexual abuse of a child is a second degree felony.

(4) A person commits aggravated sexual abuse of a child when in conjunction with the offense described in Subsection (2) any of the following circumstances have been charged and admitted or found true in the action for the offense:

(a) the offense was committed by the use of a dangerous weapon as defined in Section 76-1-601, or by force, duress, violence, intimidation, coercion, menace, or threat of harm, or was committed during the course of a kidnapping;

(b) the accused caused bodily injury or severe psychological injury to the victim during or as a result of the offense;

(c) the accused was a stranger to the victim or made friends with the victim for the purpose of committing the offense;

(d) the accused used, showed, or displayed pornography or caused the victim to be photographed in a lewd condition during the course of the offense;

(e) the accused, prior to sentencing for this offense, was previously convicted of any sexual offense;

(f) the accused committed the same or similar sexual act upon two or more victims at the same time or during the same course of conduct;

(g) the accused committed, in Utah or elsewhere, more than five separate acts, which if committed in Utah would constitute an offense described in this chapter, and were committed at the same time, or during the same course of conduct, or before or after the instant offense;

(h) the offense was committed by a person who occupied a position of special trust in relation to the victim;

(i) the accused encouraged, aided, allowed, or benefitted from acts of prostitution or sexual acts by the victim with any other person, or sexual performance by the victim before any other person, human trafficking, or human smuggling; or

(j) the accused caused the penetration, however slight, of the genital or anal opening of the child by any part or parts of the human body other than the genitals or mouth.

(5) Aggravated sexual abuse of a child is a first degree felony punishable by a term of imprisonment of:

(a) except as provided in Subsection (5)(b), (5)(c), or (6), not less than 15 years and which may be for life;

(b) except as provided in Subsection (5)(c) or (6), life without parole, if the trier of fact finds that during the course of the commission of the aggravated sexual abuse of a child the defendant caused serious bodily injury to another; or

(c) life without parole, if the trier of fact finds that at the time of the commission of the aggravated sexual abuse of a child, the defendant was previously convicted of a grievous sexual offense.

(6) If, when imposing a sentence under Subsection (5)(a) or (b), a court finds that a lesser term than the term described in Subsection (5)(a) or (b) is in the interests of justice and states the reasons for this finding on the record, the court may impose a term of imprisonment of not less than:

(a) for purposes of Subsection (5)(b), 15 years and which may be for life; or

(b) for purposes of Subsection (5)(a) or (b):

(i) 10 years and which may be for life; or

(ii) six years and which may be for life.

(7) The provisions of Subsection (6) do not apply when a person is sentenced under Subsection (5)(c).

(8) Subsections (5)(b) and (5)(c) do not apply if the defendant was younger than 18 years of age at the time of the offense.

(9) Imprisonment under this section is mandatory in accordance with Section 76-3-406.

Credits

Laws 1983, c. 88, § 24; Laws 1984, c. 18, § 10; Laws 1989, c. 170, § 4; Laws 1995, c. 337, § 8, eff. May 1, 1995; Laws 1995, 1st Sp.Sess., c. 10, § 9, eff. April 29, 1996; Laws 1996, c. 40, § 10, eff. April 29, 1996; Laws 1998, c. 131, § 1, eff. May 4, 1998; Laws 2003, c. 149, § 3, eff. May 5, 2003; Laws 2007, c. 339, § 19, eff. April 30, 2007; Laws 2013, c. 81, § 10, eff. May 14, 2013; Laws 2013, c. 196, § 8, eff. May 14, 2013; Laws 2014, c. 135, § 4, eff. May 13, 2014; Laws 2014, c. 141, § 2, eff. May 13, 2014.

Notes of Decisions (146)

U.C.A. 1953 § 76-5-404.1, UT ST § 76-5-404.1
Current through 2014 General Session.

End of Document

Tab C

INSTRUCTION NO. 35

In order for you to convict defendant of the offense of ENTICING A MINOR as charged in Count 5 of the Information, the prosecution must prove each of the following essential elements beyond a reasonable doubt:

1. On or about the date charged in the Information the defendant used the Internet or text messaging to solicit, seduce, lure, or entice another person to engage in any sexual activity which is a violation of state criminal law;

2. That such other person was a minor;

3. That such conduct was done intentionally, knowingly, or recklessly.

If, after careful consideration of all of the evidence in this case, you are convinced that the prosecution has proven each of the foregoing essential elements beyond a reasonable doubt, then you must find the defendant guilty of ENTICING A MINOR as charged in Count 5. On the other hand, if you are not so convinced beyond a reasonable doubt of any one or more of the foregoing essential elements, then you must find defendant not guilty of ENTICING A MINOR as charged in Count 5.

THIRD JUDICIAL DISTRICT COURT

FOR SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH, Plaintiff, VS. KRIS DAVID ORDIWAY, Defendant.	Case No. 121401199 JURY INSTRUCTIONS

BEFORE THE HONORABLE BRUCE C. LUBECK

WEST JORDAN COURTHOUSE
8080 Redwood Road
West Jordan, Utah 84088

September 06, 2013

telephone or computer to another person's telephone or computer by addressing the communication to the person's telephone number.

Any sexual activity with a person under the age of 14 years is a violation of Utah criminal statutes.

And just as an aside, though not applicable here, the offense is committed and it is not a defense if the person who is solicited is in fact not a minor, but the accused person believes the other person is a minor; even if the person solicited was a law enforcement official or undercover operative.

35: In order for you to convict the defendant of the offense of enticing a minor as charged in Count V of the information, the State must prove each of the following essential elements. One: That on or about the date charged in the information the defendant used internet or text messaging to solicit, seduce, lure or entice another person to engage in any sexual activity which is a violation of state criminal law.

Two: That such other person was a minor. Three: That such conduct was done knowingly, intentionally or recklessly. If after careful consideration of all of the evidence in this case you are convinced that the State has proven each forgoing essential elements beyond a reasonable doubt then you must find the defendant guilty of enticing a minor as charged Count V.

On the other hand, if you are not so convinced beyond a reasonable doubt of any one or more of the foregoing essential elements then you must find the defendant not guilty of enticing a minor as charged in Count V.

Instruction 36: In Count VI, the defendant is charged in -- with -- is charged with dealing in material harmful to a minor. The statute allegedly violated provides in part a person is guilty of dealing in material harmful to a minor when knowing the person is a minor or having negligently or recklessly failed to determine the age of a minor, intentionally distributes, exhibits, or offers to exhibit to a minor any material harmful to a minor.

For purpose of this Count VI, the following definitions apply. Distribute means to transfer possession with or without consideration. Exhibit means to show. Minor means someone under 18. Harmful to minors means that quality of any description or representation in any form of nudity, sexual conduct, sexual excitement or sadomasochistic abuse when it taken as whole appeals to the prurient interest in sex with miners, is patly offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors.

And C: Taken as a whole does not have serious value for minors in the areas of literary, artistic, political or scientific value for minors. Material means anything printed

Tab D

INSTRUCTION NO. 34

In Count 5 defendant is charged with ENTICING A MINOR. The relevant portions of the Utah statute provide that it is a violation of law for a person to knowingly use the Internet or text messaging to solicit, seduce, lure, or entice a minor to engage in any sexual activity which is a violation of state criminal law.

For purposes of this statute and Count 5, a "minor" is any person under the age of 18 years of age.

"Text messaging" means a communication in the form of electronic text or electronic images sent by a person from a telephone or computer to another person's telephone or computer by addressing the communication to the person's telephone number.

Any sexual activity with a person under the age of 14 years is a violation of Utah criminal statutes.

Though not applicable here, the offense is committed and it is not a defense if the person who is solicited is in fact not a minor but the accused believes the other person is a minor, even if the person solicited is a law enforcement official or undercover operative.

THIRD JUDICIAL DISTRICT COURT

FOR SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH, Plaintiff, VS. KRIS DAVID ORDIWAY, Defendant.	Case No. 121401199 JURY INSTRUCTIONS

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considering, two, three or four, aggravated sexual abuse of a child.

On the other hand, if you are not so convinced beyond a reasonable doubt of any or more of the foregoing essential elements, then you must find the defendant not guilty of aggravated sexual abuse of a child in the count you're considering, II, III or IV. If you find the defendant committed elements I through IV, but not elements V, he is guilty of the lesser included offense of sexual abuse of a child.

No. 33: In all of the counts I through IV, criminal solicitation of rape of a child and aggravated sexual abuse of a child the concept of consent or lack of consent is an element. An act is without consent of the other under many situations and specifically in this case such as where the person is under the age of 14.

No. 34: In Count V, the defendant is charged with enticing a minor. The relevant portions of the Utah statute provide that it is a violation of law for a person to knowingly use the internet or text messaging to solicit, seduce, lure, or entice a minor to engage in any sexual activity which is a violation of state criminal law. For purpose of this statute in Count V, a minor is any person under the age of 18.

Text messaging means communication in the form of electronic text or electronic images sent by a person from a

telephone or computer to another person's telephone or computer by addressing the communication to the person's telephone number.

Any sexual activity with a person under the age of 14 years is a violation of Utah criminal statutes.

And just as an aside, though not applicable here, the offense is committed and it is not a defense if the person who is solicited is in fact not a minor, but the accused person believes the other person is a minor; even if the person solicited was a law enforcement official or undercover operative.

35: In order for you to convict the defendant of the offense of enticing a minor as charged in Count V of the information, the State must prove each of the following essential elements. One: That on or about the date charged in the information the defendant used internet or text messaging to solicit, seduce, lure or entice another person to engage in any sexual activity which is a violation of state criminal law.

Two: That such other person was a minor. Three: That such conduct was done knowingly, intentionally or recklessly. If after careful consideration of all of the evidence in this case you are convinced that the State has proven each forgoing essential elements beyond a reasonable doubt then you must find the defendant guilty of enticing a minor as charged Count V.

Tab E

INSTRUCTION NO. 24

A person acts "intentionally" or "with intent" or "wilfully" when his conscious objective is to cause a certain result or to engage in certain conduct.

A person acts "knowingly" or "with knowledge" with respect to his conduct or to circumstances surrounding his conduct when the person:

is aware of the nature of his conduct; OR

is aware of the particular circumstances surrounding his conduct.

A person acts knowingly, or with knowledge, with respect to a result of his conduct when he is aware that his conduct is reasonably certain to cause the result.

A person acts recklessly when he is aware of a substantial and unjustifiable risk that his or her conduct will cause a particular result, consciously disregards the risk, and acts anyway.